

COMPLIMENTARY READING
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DEPONENT

1
2
3 IN THE UNITED STATES DISTRICT COURT
4 FOR THE EASTERN DISTRICT OF PENNSYLVANIA
5

6 CONSTELLATION NEWENERGY: CIVIL ACTION
7 INC., :
8 Plaintiff, :
9 :
10 vs. :
11 POWERWEB TECHNOLOGIES, :
12 INC., et al., :
13 Defendants. : NO. 02-CV-2733 (HB)
14

15
16 Philadelphia, Pennsylvania
17 Friday, June 18, 2004
18

19 Pretrial Examination of PETER
20 FOX-PENNER, Ph.D., taken pursuant to notice,
21 at the law offices of Wolf Block, LLP, 1630
22 Arch Street, 22nd Floor, on the above date,
23 beginning at approximately 10:10 a.m., before
24 Debra Ann Whitehead, a Court Reporter, an
25 Approved Reporter of the United States

26 District Court, and Notary Public.
27 V A R A L L O Incorporated
28 Litigation Support Services
29 1835 Market Street, Suite 600
30 1835 Market Street
31 Philadelphia, PA 19103
32 (215) 561-2220



VARALLO Incorporated

1 Peter Fox-Penner, Ph.D.

2 Q. Can you turn with me to Bates Page
3 FPB 006391 in NewEnergy Exhibit 80, which is
4 Page 43 of your original report, otherwise
5 known as Table 12 of your report.

6 MR. GARCIA: I believe there
7 were two Table 12's.

8 MR. GLASER: Not in the first
9 report.

10 A. I'm sorry. FPB 006391?

11 Q. Yes, sir.
12 Are you there?

13 A. Yes.

14 Q. Now, I appreciate that you have a
15 supplemental report where this table is
16 amended, I think, two different ways, but just
17 sticking with your original report for the
18 moment.

19 Which part of this damages table
20 consists of the work of the Brattle Group?

21 MR. GARCIA: Objection to the
22 form of the question.

23 A. Well, the Brattle Group prepared
24 this table in its entirety, but some of the
25 data in the table come from and are sponsored

1 Peter Fox-Penner, Ph.D.

2 by Mr. Pappas.

3 Q. Which parts are sponsored by Mr.
4 Pappas?

5 A. The lines that say, "Sales and
6 Service of Powerweb Systems."

7 Q. Is that the one that totals in the
8 first column \$30,662,007?

9 A. Yes, sir.

10 Q. Okay.

11 A. That line and the two lines below
12 it, which are all part of the Sales and
13 Service of Powerweb Systems, that comes from
14 Mr. Pappas.

15 Moving down the table, there are
16 three lines starting with BG&E contract. And
17 those three lines all the way across come
18 directly from Mr. Pappas and are sponsored by
19 him.

20 And, finally, the three lines
21 starting with Lost Contracts come from and are
22 sponsored by Mr. Pappas.

23 Q. Do you have any understanding as to
24 how Mr. Pappas derived the group of numbers
25 associated with the first item you pointed me



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2 received.

3 Q. When did you receive it?

4 A. I don't know the exact date I
5 received it.

6 Q. Your memo to your file that you sent
7 to Mr. Garcia on May 7 doesn't reference that
8 you have received Mr. Pappas' report, does it?

9 A. No, it does not.

10 Q. Do you believe that in fact you had
11 received Mr. Pappas' report before you wrote
12 this memo to the file?

13 A. Yes, I am certain I had received it
14 by May 7.

15 Q. Did you review Mr. Pappas' report in
16 advance of creating and finalizing your
17 initial report?

18 A. No, I did not.

19 Q. So no part of Mr. Pappas' original
20 report played any role whatsoever in the
21 report that you have prepared in your original
22 report; correct?

23 A. No part other than the numbers.

24 Q. The numerical output?

25 A. The numerical output. No other part



1 Peter Fox-Penner, Ph.D.

2 of it.

3 Q. Did you have discussions with Mr.
4 Pappas or with Mr. Budike as to how Mr. Pappas
5 derived the output that's contained in this
6 one page in the back of NewEnergy-82?

7 A. As I indicated earlier, I had one
8 meeting that I can recall at the initiation of
9 my work and Mr. Pappas' work to get clear on
10 the portions of the damages calculation that
11 he was going to calculate and that I was going
12 to calculate.

13 Beyond -- after that meeting, I
14 can't recall any specific conversations with
15 Mr. Pappas. There may have been one or two
16 phone calls, but I'm pretty sure there were
17 no -- that there were no meetings, and I just
18 can't recall any substantive discussions.

19 MR. WHITE: Can you mark this
20 as NewEnergy Exhibit 83.

21 (Document marked for
22 identification as NewEnergy Exhibit 83.)

23 BY MR. WHITE:

24 Q. Sir, I am showing you what's been
25 marked as NewEnergy Exhibit 83. It is an



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2 Q. Does the Brattle Group have any
3 opinion as to the validity of the Verizon load
4 management?

5 A. Let me just check.

6 No; I believe that number also
7 came -- or, excuse me, that number represents
8 the present value of the numbers that came
9 from Mr. Pappas.

10 Q. So the Verizon load management
11 number of \$1.888 million, the source for that
12 is Mr. Pappas; correct?

13 A. Yes. And in that sense, if I could
14 reference this as an amendment to my earlier
15 answer about the lines of this table that came
16 from Mr. Pappas.

17 Q. Sure.

18 A. I apologize. I inadvertently
19 omitted that line.

20 Q. Put another way, and perhaps an
21 easier way, is that the only source of numbers
22 on this table that's from the Brattle Group,
23 is the box related to Curtailment Revenues at
24 the top of the page; correct?

25 MR. GARCIA: I object to the



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2 form of the question. And your use of
3 the word "source" is ambiguous, given
4 that there were inputs to Mr. Pappas from
5 Brattle Group and that the numbers that
6 came back from Pappas were reduced to
7 present value by Brattle. So it is not
8 quite that simple.

9 MR. WHITE: You could have
10 objected and you can go back and ask
11 questions, if you like. You don't need
12 to do that.

13 MR. GARCIA: Explain why.

14 MR. WHITE: Really, I don't
15 need the explanation. Objection to the
16 form is fine, and I will take my risk --

17 MR. GARCIA: Okay.

18 MR. WHITE: -- with a vague
19 record, if I need to.

20 A. You referred to a box. I would
21 prefer to say that the --

22 Q. How about a section?

23 A. The one, two, three, four, five --
24 six lines on this table in the section
25 Curtailment Revenues, and the five following



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2 lines, are numbers entirely produced and
3 sponsored by myself.

4 The remaining lines of the table are
5 numbers calculated -- that are present value
6 of numbers that are calculated and sponsored
7 by Mr. Pappas.

8 Q. And am I correct that for those
9 numbers that are calculated and sponsored by
10 Mr. Pappas, you have no idea how he derived
11 those numbers?

12 A. Well, I would have to say no to
13 that.

14 Q. Do you know what he did to derive
15 those numbers?

16 A. I know something about what he did
17 to derive those numbers.

18 Q. Tell me what you know.

19 A. What I know is that, for at least
20 some of these lines I provided him with my
21 estimate of customers and meters in each year
22 that I forecast would have been involved in
23 load management in association with NewEnergy.

24 And he took those numbers of
25 customers and meters and estimated the profits



1 Peter Fox-Penner, Ph.D.

2 that Powerweb itself would have earned from
3 the sales of systems and systems support
4 related to those meters and customers.

5 Q. How do you know that that's what Mr.
6 Pappas did?

7 A. That's what we discussed that he
8 would do in this initial meeting. And, from
9 my recollection of his report, that's what he
10 says he did.

11 Q. Do you know whether he did it
12 accurately or correctly?

13 A. No. As I've said, I have not
14 checked it, his method or calculation itself.

15 Q. Have you checked whether he took
16 your inputs -- or, excuse me. Have you
17 checked whether he took the assumptions or the
18 base numbers that you gave and used the
19 correct numbers?

20 A. No, I have not checked his math.

21 Q. Have you checked whatever model he
22 used to generate his values?

23 A. No, did not check his model or
24 calculation.

25 Q. And you have no assessment or



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2 to load-management customers products or
3 services, other than, perhaps, to Bell
4 Atlantic?

5 MR. GARCIA: Objection. All of
6 this goes to liability, not damages,
7 which was the scope of his report.

8 A. I have not reached any conclusion
9 about that. But there is certainly language
10 in those agreements that I have seen that
11 could be interpreted as creating a
12 relationship between Powerweb and NewEnergy.

13 But I'm not a lawyer, I can't reach
14 any legal conclusions about those agreements.

15 As a practitioner, all I can say is
16 that I looked at them and saw something that,
17 to my nonlegal eyes, suggests a business
18 relationship between the two entities.

19 Q. Do you believe that that business
20 relationship, to the extent you understand it,
21 would justify a \$30.6 million damages figure?

22 MR. GARCIA: Same objection.

23 A. If you're asking me about Mr.
24 Pappas' estimate, which I have present valued
25 to be \$30.6 million, I have no opinion as to



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2 about.

3 A. As I said, I don't know the degree
4 of conservatism in Mr. Pappas' numbers.

5 Q. You don't know if there is a degree
6 of conservatism in those numbers, do you?

7 A. I will just say I don't know the
8 degree of conservatism in Mr. Pappas' numbers.

9 Q. Does the Brattle Group typically
10 incorporate number in its report where it has
11 no basis to assess whether those numbers are
12 valid or not?

13 A. I don't know what you mean by the
14 term "incorporate." But it is not at all
15 unusual in the course of our assignments to
16 work as part of a team of experts and to have
17 our work combined with the work of other
18 experts.

19 In this case I think I have been
20 extremely clear about how that work has been
21 combined. And the idea of combining the work
22 of several experts in a legal proceeding, I
23 would say, is quite common.

24 Q. Are you relying on the \$70 million
25 of numbers that Mr. Pappas has brought to you



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2 in your original report?

3 A. I am not relying on Mr. Pappas'
4 numbers in the sense of -- that I am not
5 sponsoring them.

6 I have taken Mr. Pappas' numbers,
7 which constitute his opinion, and I have made
8 a simple calculation to present value them for
9 the -- so that they can be discounted at the
10 same -- in the same framework as the rest of
11 my numbers.

12 But he is sponsoring his numbers,
13 his opinions, and I am sponsoring mine.

14 Q. And hopefully this will be the last
15 question about Mr. Pappas' numbers for a
16 while.

17 You don't have any reason to believe
18 Mr. Pappas' numbers are reliable in any way,
19 do you?

20 MR. GARCIA: Objection to the
21 form of the question.

22 A. I would disagree with that.

23 Q. What's your basis to say that Mr.
24 Pappas' numbers are reliable?

25 A. Well, my understanding is that Mr.

